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WATER MARKETING FACTS

NUMBER ONE

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INTRODUCTION TO WATER MARKETING IN MONTANA

THIS ARTICLE IS ONE OF SEVEN IN A SERIES WRITTEN AND PUBLISHED BY
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INTRODUCTION TO WATER MARKETING IN MONTANA

The potential use of Montana water by major industrial interests developed into the most controversial natural resource issue of the 1983 legislative session. Stimulated by the recent sale of South Dakota water to the ETSI Pipeline Company, the governor and the minority leader of the House of Representatives developed legislative proposals to market limited quantities of surplus Montana water. The South Dakota sale promised to bring millions of dollars to that state's coffers, and many Montana policy makers believed Montana could similarly benefit without jeopardizing traditional existing and future users of Montana water. They asserted that the revenue generated through water marketing could be used for a variety of purposes, including the water development program, soil and water conservation programs, and the general fund.

As discussion of the water marketing proposals increased, many questions about the impacts of those proposals surfaced. These included questions on the effects of potential water sales on downstream existing and future users, the constitutionality of Montana's existing water export laws in light of recent U.S. Supreme Court decisions, and the environmental impacts of implementation of the water marketing plans.

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Many legislators and interested citizens maintained that these policy issues were so important and so complex that water marketing needed to be studied extensively before major decisions were made. These legislators prepared a bill that changed the portions of Montana water law that were clearly unconstitutional and that provided for the appointment of a bipartisan committee of legislators to study the questions surrounding water marketing during the interim between the 1983 and 1985 legislative sessions.

As the legislative session neared its end, a majority of legislators concluded that the study approach was necessary for proper consideration of any potential water marketing program. The Legislature adopted HB 908, which provided for the appointment of a Select Committee to conduct the study. The bill directed the Select Committee to study the following elements:

- the economic, legal, and environmental advantages and disadvantages of water marketing;

- the present and future in-state demands for water for domestic, municipal, agricultural, industrial, recreational, in-stream flows, and other beneficial uses;

- how best to encourage a negotiated resolution of the conflicting demands of water users within the Missouri River Basin and to discourage lawsuits and federal congressional action initiated by lower basin states;

-- the potential effects of a coal slurry pipeline on the railroad industry and rail rates for non-coal shippers;

-- the potential effects of a coal slurry pipeline on coal production and the economic and environmental effects of increased coal production;

-- alternative structures for a water marketing program;

-- alternative uses of revenue derived from water marketing; and

-- the potential ecological effects of the installation and operation of coal slurry pipelines.

Eight legislators were appointed to the Select Committee, including Senator Dave Manning (D-Hysham), Senator Jim Shaw (R-Wibaux), Senator Jean Turnage (R-Polson), Senator Chet Blaylock (D-Laurel), Representative Dan Kemmis (D-Missoula), Representative John Harp (R-Kalispell), Representative John Shontz (D-Sidney), and Representative Dennis Iverson (R-Whitlash). The Committee began its work in August, 1983, with the adoption of a study plan that included extensive information gathering and public involvement before decisions were made. The Committee considered the legal issues that frame the water marketing questions and determine Montana's ability to make decisions affecting future water use. The subject of water availability, including the physical amount of water and how that water is allocated to different users, received considerable attention by the Committee. The Committee has concentrated its study on the Missouri River Basin and how Montana's water policy decisions fit within the overall management of the Basin.

As the study progressed, several Committee members expressed concern that the citizens of Montana were not sharing sufficiently in the information gathering that the Committee was undertaking. The Committee decided to develop a series of background papers for distribution to public libraries, newspapers, and radio and television stations.

By making these papers available, the Committee hopes to inform citizens of the important issues facing Montana in developing a water policy that will provide long-term benefit to the people. The series of papers will discuss the following topics:

- 1) WATER AVAILABILITY
- 2) LEGAL CONSIDERATIONS
- 3) WATER MANAGEMENT IN THE MISSOURI RIVER BASIN
- 4) RESERVED WATER RIGHTS
- 5) THE FUTURE OF WATER DEVELOPMENT IN MONTANA
- 6) POLICY OPTIONS AND CONSIDERATIONS.

In the late summer of 1984, the Committee will develop alternative proposals based on this information. The Committee will then conduct extensive public hearings in eastern and western Montana to learn citizen views on water marketing issues.

The legislators on the Select Committee on Water Marketing believe the decisions facing Montana in developing a sound water management policy are of major importance and concern to the citizens of this state. An informed

public can greatly assist the Committee in recommending necessary action to the 1985 Legislature.

Persons desiring additional information on any aspect of the water marketing issues are encouraged to contact any Committee member or the Environmental Quality Council (Capitol Station, Helena, MT 59620; 444-3742).



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WATER AVAILABILITY

One of the primary concerns of the Select Committee on Water Marketing is the question of water availability. Does the state have sufficient water to meet all existing and future needs? Does the state have surplus water that can be developed for beneficial use in Montana? This paper will discuss the basic information used in determining water availability and the status of this information for Montana.

Water availability is dependent on two general considerations: (1) the physical amount of water that exists at a given time and (2) the legal and institutional constraints on the allocation and use of the water. Each of these topics has been the central focus of many studies and planning efforts conducted by the Department of Natural Resources and Conservation and various federal agencies. Considerable data are available for Montana's major river systems, as well as many of the tributaries.

The information used to estimate water availability includes certain basic data, (e.g. historic stream flow records, existing water rights and water use records) along with certain assumptions about future water uses

and unquantified water rights. Thus water availability data are not absolute numbers but rather best estimates of how much water will be available under different levels of water use and different levels of water supply. The accuracy of these estimates continues to improve as new information is developed.

Information on water rights is especially important in estimating water availability. Before 1973, Montana water law did not require centralized recording and administration of water rights. Water rights were use rights (diverting and putting water to beneficial use), filed rights (filing notice with the county), and decreed rights (resulting from court adjudication). In 1973 the Montana Legislature passed the Montana Water Use Act, which states that new water rights require a permit from the Department of Natural Resources and Conservation. The statewide adjudication program authorized by the Legislature requires that all water rights held prior to 1973 must be adjudicated. The program provides a means to identify, quantify and prioritize all pre-1973 water rights. This process, which is expected to be completed by 1990, will greatly improve the water data base and thus the estimate of water availability.

One important water rights question that affects water availability is the quantity of water reserved for Indian tribes and federal lands in Montana. These water rights were created at the time land was withdrawn from the public domain, but the actual quantity of water allocated for these purposes has not been adjudicated. The Reserved Water Rights Compact

Commission, established by the 1973 Water Use Act, has the responsibility to negotiate these federal reserved water rights. Until these rights are determined by negotiation or litigation, the Indian and non-Indian federal reserved water rights must be estimated in calculating total water availability. These rights can have an important impact on water availability because the priority is based on the date the federal lands or Indian reservations were established.

Finally, the 1973 Water Use Act established provisions for water to be reserved by any public agency of the state or federal government. Such reservations of water may be for future or existing beneficial uses or to maintain minimum stream flows for water quality and fish and wildlife habitat. Water reservations have been established on the Yellowstone River for municipal use, fish and wildlife habitat, water quality, irrigation and offstream storage. Within Montana such reservations are accorded equal legal status with a water right. Outside the state, however, the status of a reservation is not clear. If the reservations are intended to meet foreseeable needs and progress is made in perfecting, or developing, the reservations, they probably will have more significance in the state's effort to protect its water from downstream claims.

As a headwater state, Montana supplies a significant amount of water to downstream states. Stream flow records indicate that the average total outflow from Montana is about 43.8 million acre-feet per year. Of that amount about 59.3% flows into the Columbia River system west of the

Continental Divide, 2.3% flows north to the Hudson Bay drainage, and the remaining 38.4% flows into the Missouri River Basin.

In the Columbia River Basin, two major river systems, the Clark Fork and the Kootenai, have extensive hydropower water rights which severely limit the amount of water available for new large-scale consumptive uses. Studies of the present and future uses of water in this basin indicate surplus water would only become available by the creation of new storage facilities.

East of the Continental Divide, the Upper Missouri and Yellowstone rivers and their tributaries form the headwater of the Missouri River Basin. Extensive irrigation development accounts for the major consumptive use in this region, while hydropower is a major instream use at the Montana Power Company dams along the Upper Missouri River.

The average annual outflow from the Upper Missouri River at the Montana border is approximately 7.7 million acre-feet; approximately 8.8 million acre-feet per year flow out of state from the Yellowstone Basin. In combination, these account for approximately 50% of the average flow of the Missouri River at Sioux City, Iowa.

Water availability studies conducted by the federal government and the Department of Natural Resources and Conservation indicate there is surplus water available for industrial purposes from Fort Peck Reservoir on the

Missouri and Yellowtail Reservoir in the Yellowstone River Basin. At the present time the Department of Natural Resources and Conservation has a contract with the Bureau of Reclamation to market water from Fort Peck Reservoir (approximately 300,000 acre-feet), and the department is authorized to develop a contract for marketing water from the Yellowtail Reservoir. In addition to providing revenues to the state, some Montanans believe that the use of these waters would strengthen Montana's legal position if challenged by downstream states. Except for water in storage reservoirs, the state has not identified any other water as surplus or marketable.

The potential for conflicts with downstream users over water availability in Montana exists both east and west of the Continental Divide. West of the Continental Divide in the Columbia River Basin, availability is controlled by huge hydroelectric power water rights at the Montana-Idaho state line. This large water right has the affect of guaranteeing that practically all of the water leaving Montana will meet downstream water needs.

In contrast, east of the Continental Divide in the Missouri and Yellowstone River basins a considerable quantity of water is available in Montana for appropriation to future consumptive water uses. The lower basin states fear that further upstream diversions and depletions will reduce the high flow levels that they want continued for the protection of navigation, hydropower production, and protection of fish and wildlife

habitat. On the other hand, the upstream states view the maintenance of such downstream flows as threatening to future water development in the upper basin.

Potential threats to the ability of upper basin states, including Montana, to appropriate water for future consumptive uses include: interstate compacts between lower basin states to insure high river flows or to prevent upstream consumptive uses; diversion of Missouri River water to midwestern states where depletion of groundwater now threatens important agricultural interests; and new water developments in the downstream states which establish their rights to the water.



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WATER MARKETING FACTS

NUMBER THREE

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LEGAL CONSIDERATIONS

Prior to selecting a water marketing strategy, Montana must be confident that its decisions will withstand potential court challenges. Federal law, judicial rulings, and interstate agreements combine to set the legal framework for state actions in water marketing. Although many issues remain unresolved, a review of the legal considerations does indicate the extent of Montana's ability to restrict water export and to put state waters to beneficial use.

Can Montana restrict the export of waters appropriated in the state?

Water export for legal purposes occurs when a person appropriates water under state law and then conveys the water for use in another state. While states in the arid west have substantial economic and other interests in preventing or restricting water export, there are legal constraints on doing so. The principal legal consideration affecting a state's control of water export is the Commerce Clause of the United States Constitution.

The Commerce Clause has two basic components. First, it gives Congress complete and exclusive power to act, if it chooses, in areas involving or affecting interstate commerce. Second, it prohibits states from placing unreasonable burdens on or discriminating unfairly against interstate commerce. At the present time Congress has not exercised its commerce power in such a way that limits Montana's ability to regulate the export of water. Therefore, provided the state does not unduly burden or discriminate against interstate commerce, the commerce clause does not place limitations on the state's management of the resource.

What then constitutes an impermissible burden or unfair discrimination for commerce clause purposes? In the case of Sporhase v. Nebraska, decided in 1982, the United States Supreme Court ruled that a Nebraska law that disallowed the shipment of water to a neighboring state unless such state provided reciprocal rights for Nebraska water users, violated the commerce clause. The court recognized that an arid state such as Nebraska had a legitimate interest in conserving and preserving water for in-state use but held that it was not free to discriminate against out of state users through a reciprocity requirement, unless such requirement could be shown to be "narrowly tailored" to serve the conservation or preservation interest. In non-binding language the court further stated that it is conceivable that a state could justify even a total ban on the exportation of water. To do so, it said, a state must assert a bona fide need to conserve and preserve water and demonstrate that in addition to being

closely tailored to serving that purpose, there are no adequate non-discriminatory alternatives to the ban.

The Sporhase case thus indicates that laws to restrict water export will be upheld if the states can prove a genuine need to conserve water and can show that the laws are carefully fashioned to minimize the effects on interstate commerce.

Greater uncertainty exists regarding the possible future exercise by Congress of its commerce power. When and if Congress acts, it may either restrict or expand state authority to regulate water exports. Based on the fact that populations and probably political strengths tend to be greater in non-headwater states, it is likely that any such action will restrict, not expand, state authority in this area.

What legal constraints are there on the ability of Montana and its citizens to put interstate waters to consumptive beneficial use?

A consumptive use occurs whenever less water is returned to its source than was initially withdrawn and put to use. Irrigation of farm land is an example of a consumptive use in that generally only 45% to 60% of the water applied to agricultural land returns to the source from which it was taken. The use of water for generating electricity on the other hand is almost entirely non-consumptive. There is a direct relationship between the amount of water put to consumptive use in a headwater state and the amount

of water subsequently available for use in downstream states. To prevent upstream states from taking unfair advantage of their position, several legal mechanisms have been developed to apportion interstate waterways. These include compacting, Acts of Congress, and judicial apportionment by the federal courts.

Compacting involves a congressionally ratified agreement between two or more states. Congressional apportionment occurs when Congress passes a law that allocates interstate waters among several states. And judicial apportionment results from a court's resolution of a lawsuit between states wherein certain interstate waters are equitably divided among the parties.

In Montana, the only interstate waterway that has been apportioned is the Yellowstone River. The Yellowstone is the subject of a compact between the states of Montana, Wyoming, and North Dakota, which entitles each state to a percentage of the unappropriated waters of the Yellowstone's tributaries. Existing rights to the Yellowstone itself are recognized and preserved.

The Columbia and Missouri rivers will quite probably be apportioned by one of these three methods in the future. When and by which method will depend to a certain extent on the future actions of the State of Montana. Montana could initiate and facilitate compact negotiations, or maximize water development in-state and refrain from compact negotiations, or even commence a legal action seeking an equitable apportionment.

In evaluating these alternatives, the Select Committee on Water Marketing is considering the potential costs and benefits of each option. Importantly, the committee is aware that even a decision to take no affirmative action may be greatly significant. Indeed, until and unless Montana takes some action that limits the range of options, other states are free to elect and involve Montana in the course of action that is most favorable to them in resolving interstate water issues.



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WATER MANAGEMENT IN THE MISSOURI RIVER BASIN

The Flood Control Act of 1944 is the most important federal law governing water management in the Missouri River Basin. In passing the act, Congress sought to accomplish two important objectives in the Missouri River Basin. The first purpose was to establish a means of controlling floods and promoting navigation in the lower reaches of the Missouri River. The second was to promote the production of hydroelectric power and expand irrigation in the upper portions of the basin. Both of these objectives are embodied in the Pick-Sloan Plan, which constitutes the core of the act.

Under the Pick-Sloan Plan, a number of water development projects have been authorized and built in the Upper Missouri Basin. These projects, which include Fort Peck (Montana), Garrison (North Dakota) and Oahe (South Dakota) reservoirs, were designed to satisfy the demand for hydroelectricity and irrigation.

Without question, however, the greatest benefits from the Pick-Sloan Plan have been realized by the lower basin states through substantially improved flood control and navigation. For example, while the overall

benefits to navigation are nearly double what was originally planned for, the State of Montana has only received 5% of the federally developed irrigated acreage it expected to receive under the plan. Likewise, North and South Dakota have received only 1% and 2%, respectively, of what they were promised. Moreover, the upstream states have lost considerable acreage of prime farmland to the construction of dams and reservoirs.

In terms of tangible benefits, then, it seems that Montana and the other upper basin states have been somewhat shortchanged by the Flood Control Act of 1944. In the long run, however, the upper basin states may be compensated for this apparent inequity. Such compensation seems to exist in a portion of the act known as the O'Mahoney-Milliken amendment.

The O'Mahoney-Milliken amendment, also passed in 1944, states in part that the use of waters for navigation in the western states (states west of the 98th meridian) shall not conflict with the consumptive use of waters in those states for domestic, municipal, stock water, irrigation, mining, or industrial purposes. The simple meaning of this is that consumptive uses of water in the west are given a preference over the use of water for navigation and flood control. Significantly, the only limitation placed on this preference is the requirement that the consumptive water use occur within one of the western states. With the exception of curbing a possible sale of water to states east of the 98th meridian, this limitation seems to be of little import to the State of Montana. Thus, the result of the O'Mahoney-Milliken amendment is, in effect, that the upper basin states are

legally free to maximize development of certain consumptive uses of water, even though such development may substantially reduce water availability in the lower states.

One important question, however, remains unanswered relative to Montana's decision on whether or not to engage in marketing water to coal slurry developers. This question can be phrased as follows: Is coal transport an industrial use of water entitled to the O'Mahoney-Milliken preference?

This issue is currently being litigated in the cases of Kansas City Southern Railway Co. et al v. Andrews et al and State of Missouri v. Andrews et al. In those cases the plaintiffs are challenging South Dakota's sale of water to ETSI, a coal slurry pipeline company. Among other things, it is alleged by those who seek to prevent the sale that the use of water for slurry is a transportation use, not an industrial water use, and as such can not receive preference under the O'Mahoney-Milliken amendment. Until these cases are decided and all appeals are exhausted, Montana may wish to proceed cautiously in considering any possible water sales to slurry developers.

In any event, regardless of the benefits and possible limitations of the Flood Control Act of 1944 as it exists now, it must be kept in mind that the act is subject to amendment by Congress at any time. Further, the likelihood of an amendment adverse to Montana's interests seems to be

increasing, as populations and political strength grow in states of the lower basin. In light of this, Montana and the other Upper Missouri Basin states may wish to consider how best to maximize their exploitation of the O'Mahoney-Milliken amendment before it is weakened or eliminated.



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RESERVED WATER RIGHTS

The Forty-Sixth Montana Legislature established the Reserved Water Rights Compact Commission in 1979 upon passage of Senate Bill 76. The Commission was charged with negotiating agreements for the equitable division of waters among the state and its people and the several Indian tribes and federal agencies claiming reserved water within the state (Montana Code Annotated, 85-2-701).

The Compact Commission is composed of nine members. Four members are appointed by the Governor, two are appointed by the President of the Senate, two are appointed by the Speaker of the House of Representatives, and one is appointed by the Attorney General.

Shortly after its establishment, the Commission notified all tribal leaders and appropriate federal officials of the state's desire to resolve, through negotiation, the long-standing problems that had arisen with respect to two contradictory water rights doctrines -- rights of the state's appropriation doctrine and reserved rights of the Winters doctrine.

The foundation of the Winters doctrine is a 1908 United States Supreme Court decision which involved early water users along the Milk River in Montana and the Fort Belknap tribes (Winters v. United States). In that case the court held that the United States implicitly reserved a sufficient amount of water to fulfill the purposes of the reservation upon withdrawing the land from the public domain. The court therefore ordered upstream water users to stop diverting water needed by the Fort Belknap tribes.

Since Winters, the federal courts have expanded upon the reserved water rights doctrine and have awarded water to all federal land that has been withdrawn from the public domain. According to the Winters doctrine, national forests, parks, and monuments, fish and wildlife refuges, military installations, and certain other federal lands are entitled to enough water to fulfill the purposes of the federal reservation. The priority date of a reserved right extends back to the date the area was withdrawn.

Reserved water rights are not easily reconciled with water law applied to private users in Montana. Under Montana law, priority and the amount of water that may be used are determined by the date of the original use and a showing of need for that amount. Although Winters v. United States was decided nearly 75 years ago, the effects of reserved rights on state users remain uncertain, particularly with respect to the amount of water each federal agency or tribe is entitled to use.

The Commission has until July 1, 1985, to reach agreements with the parties. If by that time a settlement has not been reached and ratified by both the Legislature and the tribe or federal agency involved, negotiations will terminate.

The Compact Commission commenced formal negotiations in 1980 when authorized representatives were named by the Northern Cheyenne tribe, the Confederated Salish and Kootenai tribes of the Flathead Reservation, the Sioux and the Assiniboine tribes of the the Fort Peck Reservation, the United States Department of Agriculture, and the United States Department of the Interior.

Without exception, it has been the experience of all negotiating parties that as talks proceed, the prospect of concluding mutually satisfactory settlements increases. An important issue in negotiations with the Northern Cheyenne Tribe, for example, has been the state's plans for rehabilitating and enlarging the Tongue River dam. The dam is situated upstream of the Northern Cheyenne Reservation. Tribal interests and the state's interests, particularly the rehabilitation of an unsafe dam, may be served if a joint project can be funded and a compact concluded. In exchange for the tribe's willingness to subordinate its reserved rights to existing uses adjacent to the reservation, the state may be able to agree to provide storage benefits to the tribe. In the absence of that exchange, both existing and future water development along the Tongue River and Rosebud Creek may be seriously affected.

Successful negotiations between the Fort Peck tribes and the Compact Commission have also involved a storage project. In this case however, the storage facility, Fort Peck Reservoir, is already in place and is large enough to allow the state, the tribes, and the Department of Interior much flexibility. In fact, the situation invites an innovative solution. An agreement was nearly reached in March, 1983, but before it became final other interested branches of state government expressed concern that certain provisions of the proposed compact may not be in the best interests of the state. Action on the proposed agreement was suspended and it is not likely that action will be taken before mid-September 1984.

In the negotiations involving non-Indian federal reserved water rights, discussions have primarily focused on the fundamental issue of the existence or nonexistence of federal nonreserved water rights. At the outset there appeared to be very little common ground between the state's interests and those of the various federal agencies. Recently, however, common objectives have been recognized, and negotiations are now concerned with the level of instream flow protection required for national forest and national park lands. Together the parties involved are evaluating the effect on upstream appropriations, assuming agreements protecting optimum flows of headwaters are in effect.

The work of the Compact Commission has been and will likely continue to be coordinated closely with that of the general water adjudication process. Chief Water Judge W. W. Lessley and the Commission chairman

communicate frequently regarding issues of common concern. It is recognized by everyone involved that both adjudication and negotiation are integral parts of the overall effort to resolve vital water rights issues in Montana, perhaps for decades into the future.

Reserved water rights involve a number of complex legal and technical issues that require patience and perseverance to solve. These issues are clearly in need of resolution before those who possess water rights can know the standing or validity of their rights, whether their rights are appropriated or reserved. Further, until this is accomplished, the State of Montana will be less certain of how much surplus water may be available in the state for such non-traditional users as coal slurry transport developers.



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WATER MARKETING FACTS

NUMBER SIX

INTRODUCTION TO WATER MARKETING IN MONTANA

THIS ARTICLE IS ONE OF SEVEN IN A SERIES WRITTEN AND PUBLISHED BY
THE MONTANA SELECT COMMITTEE ON WATER MARKETING.

THANK YOU FOR HELPING US "GET THE WORD OUT".

FOR QUESTIONS;

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TOLLFREE 1-800-332-2272 and ask that Howard return your call.



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THE FUTURE OF WATER DEVELOPMENT IN MONTANA

The competition among western states for limited water supplies is expected to increase during the next decade and beyond. Although Montana has a relatively abundant supply of water, the intrastate and interstate demands for this critical resource will intensify. Many Montanans believe that Montana must solidify its water rights claims to existing and future uses and resolve the uncertainties with Indian and federal reserved water and the Yellowstone Compact.

The state is making substantial progress in establishing these claims through the statewide water rights adjudication program, the efforts of the Reserved Water Rights Compact Commission and the development of a centralized water resource data management system. The water reservation process that has been implemented on the Yellowstone and is being considered on other major streams is another important step in identifying water needs and establishing a water development program. All of these efforts will strengthen Montana's position in an eventual allocation of water resources between the upper and lower basins and among states of the upper basins.

Agriculture is the major water use in Montana and the mainstay of our economy. Most water development efforts in the past have been to provide dependable water supplies for agriculture. Many of the existing water projects of the state were developed with federal funds authorized under the Pick-Sloan Plan of the 1944 Flood Control Act. However, Montana has not developed the water in these storage projects to the fullest extent, nor has the state developed new projects under this plan since the mid-1950s. To fully develop its potential for irrigation in eastern Montana, the state must cooperate with the federal government in developing these water supplies. Such program efforts are now underway in North and South Dakota and Wyoming. However, the reduced federal funds available for these efforts means that a greater financial burden for these projects must be carried by the state.

The large industrial demand for water that occurred in the early 1970s has subsided in Montana. Conservation efforts and an improved energy supply have diminished the rush to develop energy resources. However, many people believe this is a temporary lull in the storm and new industrial demands for water will occur in the future. To minimize the impact of industrial demands, Montana must develop its water resources to insure the traditional water users are protected. These plans can best be made and implemented now before any further demands occur.



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POLICY OPTIONS AND CONSIDERATIONS

As the water marketing study nears its conclusion, the Select Committee on Water Marketing, and later the 1985 Legislature, face several policy options. Not only must they consider the specific question of whether to market surplus Montana water to large industrial users, but they must begin to articulate the elements of a sound water management policy for the future. This policy would seek to use Montana's abundant water resources in an efficient and ecologically sound manner. It would allow for flexibility in meeting future needs of Montanans and of downstream states. A long-term water policy must give Montana a significant role in making decisions that affect the state's water resources, rather than allowing those decisions to be made solely by the federal government, the courts, and downstream states.

The first six background papers in this series have discussed the many constraints on Montana's ability to make long-term water policy decisions. Future conflicts will likely escalate between navigation interests in the lower basin states and consumptive water development in the upper basin, including Montana. In order for Montana to maximize its flexibility to

meet future water needs of its citizens, it may be in the best interest of the state to continue to develop its water. However, Montanans also realize the need to protect instream flows, which benefit not only fish and wildlife, water quality, and other Montana uses, but downstream users as well. If upper basin states continue to develop water, the conflict will escalate between upper and lower basin states, because navigational and other instream uses downstream are currently benefiting from the surplus water flows.

This conflict must be resolved through one more methods of interstate water allocation. These methods include interstate compacting, litigation before the U. S. Supreme Court for equitable apportionment, and action by the U. S. Congress. The Legislature must adopt a strategy that will enable Montana to defend against challenges to Montana's claim to water in the Missouri River Basin.

Montana's best defense for its claims to water for present and future use is ensuring that water rights and reservations in the state are quantified and in place. To accomplish this task, federal and Indian reserved water rights must be resolved and other claims adjudicated and recorded in a central location. Water reservations may need to be developed on rivers other than the Yellowstone. These reservations would protect instream flows and other beneficial uses for Montana and secure water for future development by Montanans.

Many policy makers also believe that Montana must develop larger quantities of water to ensure a supply adequate to meet future needs. But developing water is extremely costly, and with the withdrawal of federal funds for water development and the conditioning of those limited funds on state cost sharing, that development is increasingly difficult. Advocates of water development believe that one source of funds for water projects would be revenue derived from the marketing of Montana water for coal slurry and other purposes.

In considering water marketing, the state must first determine what restrictions on water export are desirable and legally defensible in light of recent U.S. Supreme Court decisions. Montana could lift its export ban and replace it with restrictions that are narrowly tailored to protect the health and welfare of Montanans. Montana could also appropriate all unappropriated waters and allocate those waters to in-state uses on a priority basis, as has been done in New Mexico.

If Montana decides to export water, it must then determine the most appropriate method. Potential methods include marketing through an essentially free market system where the state would have no role in determining price or other limitations; marketing where the state controls the market, sets prices, restricts volume, develops other conditions, and derives revenue; and marketing through the state regulatory approach, as exemplified by California. Development of the specifics of a water

marketing proposal is a difficult task and is one that must be undertaken with great care to ensure a legally defensible program.

Policy makers must determine whether or not to market water for all uses, including coal slurry. Montana currently bans the use of water for coal slurry, both in and out-of-state. If legislators decide to retain that ban, they must be prepared to defend it in court. If the ban is lifted, policy makers might wish to restrict the use of water for coal slurry pipelines by placing them under the jurisdiction of state environmental laws or by removing eminent domain authority for pipelines.

Overriding all these policy considerations is the need to analyze and determine the course that benefits the people of Montana, both now and in the long term. This is a monumental task and one of great importance to Montanans. The Legislature needs the careful thought and comment of Montana citizens in order to chart that course.



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May 22, 1984

Committees
Chairman: Appropriations
Subcommittee on Human Services
Vice-Chairman Select Committee
on Water Marketing
Member Rules
Highways & Transportation

TO: Interested Persons, Organizations, and Libraries

FROM: Rep. John M. Shontz, Vice-Chairman
The Select Committee on Water Marketing

RE: Background Information Articles on Water Marketing



The Montana Legislature's Select Committee on Water Marketing has spent a year researching and learning about the state's water resources including the legal economic and legislative factors that influence this important resource.

The enclosed series of articles provide an outline of the information the committee has learned to date. Although brief, we hope these articles will help Montanans to understand the issues and encourage their participation in the water marketing debate.

The committee is planning to hold public hearings this fall to formally gather input from across Montana prior to our preparing and submitting recommendations to the 1985 session of the Legislature. The dates and times of these public hearings will be announced as soon as they are firmly established.

Feel free to call or write us at any time if you have questions or would like additional material or information:

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or call the Citizens Advocate Office, TOLLFREE at 1-800-332-2272 and ask the operator to have Howard, me, or any committee member or person in state government you wish to visit with call you back.

